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MAURICE H. MERRILL'S CONTRIBUTION TO ADMINISTRATIVE LAW

RALPH F. FUCHS*

Delight and high admiration characterize the response aroused by a systematic reading of the works of Maurice H. Merrill on administrative law—delight in the dominant clarity and vigor of expression of the material; admiration of the merit and volume of the author's published contributions in this field. These have emerged during a lifetime devoted to teaching and public affairs as well as to scholarly work. In legal scholarship itself, administrative law has been only one of his several major concerns. His first book, published early in his career, was on implied covenants in oil and gas leases,¹ and he has continued to publish in that field;² his later, massive, three-volume work on notice is cross-sectional in relation to the entire body of law;³ and he has contributed intermittent articles and book reviews in the area of constitutional law, together with more occasional comments on jurisprudence, judicial administration, and topics with which he has been concerned as a Commissioner on Uniform State Laws. In administrative law, in addition to text passages in his casebook on the subject,⁴ the stream of articles and reviews has been continuous for 46 years.

Maurice Merrill, as he has stated,⁵ drew major insights and inspiration during his graduate study at Harvard Law School from Felix Frankfurter's class discussions in administrative law. Merrill, however, was far from becoming any one man's disciple. He studied, as well, the works of Goodnow and Freund and, later, Stason,⁶ and derived from them ideas and approaches that were to emerge in his own teaching and research. His references to Roscoe Pound are frequent. In developing his approach to the

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¹ M. MERRILL, *THE LAW RELATING TO COVENANTS IMPLIED IN OIL AND GAS LEASES* (1926). 2d ed. 1940. Lease obligations are, of course, affected by legislation and the regulation which it establishes, as Merrill brings out.

² Notably, in addition to articles, M. MERRILL, *THE PUBLIC'S CONCERN WITH THE FUEL MINERALS* (1960).

³ M. MERRILL, *MERRILL ON NOTICE* (1952). Portions of this work dealing most specifically with administrative agencies are §§ 1117, 1120, and prior sections to which reference is made.

⁴ M. MERRILL, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* (1954).

⁵ Merrill, *Three Possible Approaches to the Study of Administrative Law*, 18 *IOWA L. REV.* 228 (1933).

⁶ *Id.*; cf. Merrill's review of Stason's casebook, 32 *ILL. L. REV.* 641 (1938).

subject, Merrill saw the legal educator's need to preserve the inspiration and the enlarged vision that come from jurisprudentially oriented study, and at the same time to meet the needs of "students of mine-run grade," so as to prepare the oncoming members of the bar for tasks generated by day-to-day human affairs.⁷ He was to extend this philosophy of service beyond the law school classroom into work with the organized bar, the conduct of public interest litigation, and legislative drafting. In Oklahoma he was, as readers of the *Review* must know better than I, a principal proponent and draftsman of the state's Administrative Procedure Act.⁸ As a long-time member of the National Conference of Commissioners on Uniform State Laws, he contributed to that body's consideration of the Model State Administrative Procedure Act.⁹

Two especially significant aspects of Merrill's thought concerning administrative law should be stressed. These are his "functional approach" to problem-solving and his related recognition that the value of administrative processes is to be tested by their results in the policies they generate and the quality of the effectuation of law which they produce. His first published article inveighed against the conceptualism that denied recognition as fully judicial in the constitutional sense to court decisions on review of agency action which, by virtue of statutory or state constitutional provisions, enter into administrative policy-making.¹⁰ He insisted that, rather, court action remains truly judicial and ought to be recognized as such, so

⁷ *Supra* note 5, at 231.

⁸ 75 OKLA. STAT. §§ 301-27 (1971). Merrill prepared, with the aid of his class in administrative law, the original bill for an Oklahoma administrative procedure act, adapting the Model State Administrative Procedure Act to the legal system of the state. See Merrill, *Model Administrative Procedure Act with Suggested Modifications for Adoption in Oklahoma*, 19 OKLA. B.A.J. 1945 (1948). See also Merrill, *Calling Attention to a Proposal for Advance in State Administrative Procedure*, 17 OKLA. B.A.J. 1757 (1946).

⁹ Originally adopted in 1946 by the Commissioners, The Model Act was revised in 1961. Merrill became a member of the Conference in 1944 and was elected to life membership in 1964.

¹⁰ Merrill, *Does "Legislative Review" by Courts in Appeals from Public Utility Commissions Constitute Due Process of Law?* 1 IND. L.J. 247 (1926). According to the reasoning of the Supreme Court in *Prentiss v. Atlantic Coast Line R. Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), which Merrill criticized, such decisions in utility rate regulation are "legislative" and, even though rendered by a court, are a concluding phase of the administrative process. That process can be enjoined in a proper case, but only if the possibility of relief by means of it has been exhausted. Whether such court decisions would be nonjudicial for all purposes was not decided; but other decisions, which Merrill cites, carried the same logic further. Merrill, *The Administrative Law of Oklahoma*, 4 OKLA. L. REV. 286, 299-303 (1951). The same opposition to "conceptualism" is evident in Merrill's treatment of issues of constitutional law. See, e.g., *The Constitutional Opinions of Mr. Justice Roberts*, PA. B.A.Q. No. 21, 147-153 (1934), in which Merrill praised especially the decision in *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934), which sustained administrative regulation of milk prices.

long as the protections it is supposed to accord to the interests at stake are actually supplied.¹¹ In his volume of lectures, *The Public's Concern with the Fuel Minerals*,¹² Merrill traces the consequences of the laws applicable to the extraction, distribution, and utilization of fuel, with respect to economic enterprise, consumer satisfaction, and conservation of natural resources, stressing at one point the importance of establishing "an efficient and a just administrative process" as a means of improving "the working of many of the statutes through which the public's concern . . . is given expression." Procedures, in other words, are vital, but are inextricably intertwined with substantive goals and results. The same thought recurs in other writings.¹³

Given his functional, result-oriented approach to administrative law, Merrill could place little credence in the "fulminations about 'new despotisms' and 'wonderlands of bureaucracy'"¹⁴ which were prominent in the responses of lawyers to the growth of administrative agencies and the enlargement of their powers in the first four decades of the twentieth century. He paid little heed to them, except to dismiss them from consideration so

¹¹ Merrill argued primarily against constitutional barriers to experimentation by the states with their procedures, rather than in favor of judicial power to supplant discretionary agency action by court decision—although he saw certain advantages in such a power under varying circumstances. See also Merrill, *The Administrative Law of Oklahoma*, *supra*, note 10, at 301-303, and compare his article, Merrill, *Recent Efforts to Immunize Commission Orders Against Judicial Review: a Reply*, 16 IOWA L. REV. 62, 71-73 (1930) (limited judicial review of rate orders, even as to issues of "constitutional fact," is preferable to full review of the merits). Later he wrote that the limits of desirable judicial review are generally exceeded when agency action is modified "upon policy grounds rather than upon principles of law." In the same essay he attributed the "malign influence" of the *Prentis* opinion to the view he found in it, that "a court exercising authority to modify an administrative decision may [for that reason alone] be acting administratively rather than judicially." Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 50 (1964). I do not so interpret the *Prentis* opinion. To me it seems to say, as I understood Merrill to state originally, that a court's authority to replace an agency's order with its own (not merely for legal reasons but as a matter of judgment in the light of the evidence) rendered its power "legislative." See also Merrill, *The Administrative Law of Oklahoma*, *supra*, note 10, at 300. So interpreted, and suitably restricted as Merrill originally urged, the influence of the *Prentis* opinion need not have been harmful. The decision itself, which Merrill did not criticize, seems right.

¹² *Supra* note 2, at 75.

¹³ E.g., Merrill, *Hearing and Believing: What Shall We Tell the Administrative Agencies?* 45 MINN. L. REV. 525, 526 (1961), predicating views as to admissibility and weighing of evidence on the purpose of "securing all relevant information, with regard to fairness to the parties and with care to avoid confusion to the agency"—not on preconceptions as to the merit or lack of merit of the common law rules or on the characteristics of courts rather than those of specialized agencies. Variations among agencies will, under sufficiently flexible statutory standards, result from the "experience in evaluation" of proffered or recorded evidence on the part of administrators possessing "speciality in subject [matter]." *Id.* at 532.

¹⁴ Merrill, Review of M. M. Carrow, *The Background of Administrative Law*, 1 OKLA. L. REV. 225 (1948).

that he and others might get on with examining the governmental developments that needed to be understood.¹⁵ By the same token, he found it unnecessary to assess the validity of a later generalization by a proponent of agency processes, that regulation was becoming "concerned with management rather than police of the industries affected," leading to an agency "mission that goes considerably beyond the notion that . . . supervision of the citizen is to be held to a minimum."¹⁶ Rather than spin theories, he seemed to think, one should focus on particulars and determine later, if one could, what generalizations they might justify.

With his basic philosophy and his approach to problem-solving taking these directions, Merrill started early to develop his teaching of administrative law and to deal in a scholarly way with some of the topics that seemed important in that field. Some of these were substantive. In a well-reasoned article he discussed the test of constitutionality of alternative standards for maximum public utility rates, set by regulatory agencies.¹⁷ In a two-installment article he expounded comprehensively the developing law of a single jurisdiction, governing the recovery of workmen's compensation benefits.¹⁸ He soon added to his work on covenants in oil and gas leases a continuing series of discussions of the developing conservation and price-stabilization measures, involving these fuels, administered by regulatory agencies.¹⁹ The organizational and procedural aspects of administrative regulation in general received early treatment in the article already noted.²⁰ Later came a more comprehensive discussion of the scope of judicial re-

¹⁵ See Merrill's eloquent plea to this effect in an article that demolished an argument for maximum judicial review of public utility commission rate orders, which was infected by an alarmist philosophy relating to the "new depotism," Merrill, *Recent Efforts to Immunize Commission Orders Against Judicial Review: a Reply*, 16 IOWA L. REV. 62, 73-74 (1930). See also M. MERRILL, CASES AND MATERIALS ON ADMINISTRATIVE LAW 3 (1954).

¹⁶ Merrill, Review of J. M. Landis, *The Administrative Process*, 17 TEX. L. REV. 243, 244 (1939).

¹⁷ Merrill, *On the Distinction Between a Nonconfiscatory Rate and a Just and Reasonable Rate*, 14 CORN. L. Q. 447 (1929).

¹⁸ Merrill, *Commentary on the Iowa Workmen's Compensation Act*, 17 IOWA L. REV. 181, 343 (1932), supplemented in Merrill, *Fifteen Years More of Workmen's Compensation in Iowa*, 32 IOWA L. REV. 1 (1946).

¹⁹ Merrill, *Stabilization of the Oil Industry and Due Process of Law*, 3 S. CAL. L. REV. 396 (1930); Merrill, *Implied Covenants, Conservation and Unitization*, 2 OKLA. L. REV. 469 (1949); Merrill, *Compulsory Unitization and Individual Interests: Judicial or Administrative Jurisdiction*, 8 OKLA. L. REV. 389 (1955); Merrill, *The Legal Status of a Statutory Oil and Gas Production Unit*, 10 OKLA. L. REV. 249 (1957); Merrill, *Sinclair-Masterson: A Study in the Role of Federal Courts in Applying State Law*, 14 OKLA. L. REV. 1 (1961); Merrill, *Compulsory Oil and Gas Unitization: Effect on Overriding Royalty Obligations*, 62 MICH. L. REV. 381 (1964).

²⁰ Merrill, *Does "Legislative Review" by Courts in Appeals from Public Utility Commissions Constitute Due Process of Law?* *supra* note 10.

view²¹ and a very superior commentary on the evidence standards applicable to agency proceedings and decisions and to judicial review of fact determinations.²² More recently have come a discussion of constitutional standards governing the delegation of broad discretionary authority, which in my judgment is the best treatment this subject has received,²³ and a detailed exposition of the modern application by appellate courts of general administrative law standards to local administrative agencies.²⁴ These major contributions have accompanied an enhanced concern with such critical problems in the larger public law field as reapportionment²⁵ and betterment of the means for local governmental units to cope with modern problems.²⁶

It has, however, been through the study and development of the administrative law of Oklahoma that Merrill has made his most distinctive contribution to that field. The actual impact, bewildering variety, yet inter-related wholeness of the subject are fully realized only when its ramifications in the law of a single jurisdiction are fully known, as Merrill knows the life, the institutions, the constitutions and statutes, the administration, and the court decisions of Oklahoma. He returned to the state and to the school from which he had graduated, as professor of law, in 1936. There was not then an adequate outlet in the state for his scholarly writing.²⁷ With the establishment of the *Oklahoma Law Review* in 1948, such an outlet became available, and in its pages appeared many of the articles which, from that time forth, were to compose a unique scholarly, informed commentary on important aspects of the state's laws. The portions of it which seem to the outsider to be most noteworthy in relation to admin-

²¹ Merrill, *Judicial Review of Administrative Proceedings, A Functional Prospectus*, 23 NEB. L. REV. 56 (1944).

²² Merrill, *Hearing and Believing: What Shall We Tell the Administrative Agencies?* 45 MINN. L. REV. 525 (1961).

²³ Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968). See also M. MERRILL, CASES AND MATERIALS ON ADMINISTRATIVE LAW 49-50 (1954).

²⁴ Merrill, *The Local Administrative Agencies*, 22 VAND. L. REV. 775 (1969).

²⁵ Merrill, *Blazes for a Trail Through the Thicket of Reapportionment*, 16 OKLA. L. REV. 59 (1963).

²⁶ Norman & Merrill, *Urban Renewal in Oklahoma*, 14 OKLA. L. REV. 249 (1961); Merrill, *Our Unrealized Resource—Inter-Municipal Cooperation*, 23 OKLA. L. REV. 349 (1970). Merrill, *A Proposal for Unified State Constitutional Provisions Respecting Local Government*, 2 URBAN LAWYER 542 (1970). Earlier, Merrill, who taught municipal corporations for many years, wrote a major article entitled, *Sanctions and Fora for Enforcement of Municipal Ordinances in Oklahoma*, 10 OKLA. L. REV. 1 (1957).

²⁷ The *Oklahoma Bar Association Journal*, an unusually varied and serious state bar publication, did provide an outlet for occasional short articles dealing with current developments important to the state.

istrative law²⁸ are Merrill's discussions of certain distinctive aspects of the separation of powers and judicial review, stemming from the constitution;²⁹ his analyses of oil and gas regulation;³⁰ and his contributions to the evolution and the explanation of the state's comprehensive Administrative Procedure Act.³¹

Several points in Merrill's comments on the Act may appropriately be mentioned here. It is surprising and would hardly be known from the Act without Merrill's exposition that the Act's provisions for adjudication, applicable to any "individual proceeding" in "any matter other than rule making," are limited to proceedings in which a hearing is required, because this is what "matter" means in Oklahoma.³² In the Act, Merrill prevailed in his view, which seems essentially sound, that the evidence provision of the original Model Act, simply permitting the admission and consideration of "evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs," is superior to the internally inconsistent statement of the Revised Model Act.³³ The Oklahoma official notice provision, by its requirement that "all staff memoranda" as well as "data" must be disclosed to the parties to a proceeding, appears to include (with doubtful wisdom) memoranda relating to law or policy.³⁴ Merrill's opposition (quite sensible in itself) to the "rule of necessity," whereby deciding officers who otherwise would be disqualified because of bias or prejudice may serve when there are no replacements and participation is essential to a decision, ought, I would suggest, to be limited to narrower grounds for disqualification than are embraced by

²⁸ Illuminating in itself is a 32-page systematic catalog of additions to the administrative law of the state which were made by a single session of the legislature. Merrill, *Summary of Oklahoma Legislation Relative to Administrative Procedure in the 1955 Session*, 9 OKLA. L. REV. 449 (1956).

²⁹ Merrill, *The Basic Doctrine of Oklahoma Public Law*, 1 OKLA. L. REV. 262 (1948); Merrill, *The Administrative Law of Oklahoma*, 4 OKLA. L. REV. 286 (1951); Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 32 (1964).

³⁰ See *supra*, note 19.

³¹ In addition to preparing the initial draft of a bill, which Merrill supplied, *supra*, note 8, he served as vice chairman of a bar association committee which, following the veto of a bill passed by the legislature in 1949, developed a bill which the Association endorsed. 23 OKLA. B.A.J. 1551, 1553 (1952); 25 OKLA. B.A.J. 1941 (1954). The Act was adopted in 1963, Okla. Sess. Laws, 1963, ch. 371, 75 OKLA. STAT. §§ 301-27 (1971). Merrill promptly supplied an extensive commentary on the new law, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1 (1964), which at the outset mentions the previous history and the preparatory work that was done just prior to the legislative session.

³² Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 10-11 (1964).

³³ *Id.* at 27-28. The same point is covered more fully in Merrill, *Hearing and Believing: What Shall We Tell the Administrative Agencies?* *supra*, note 13, 531-34.

³⁴ Merrill, *Oklahoma's New Administrative Procedure Act*, *supra* note 32, at 29-30.

his words, "prejudice, partiality, interest, or, in some instances, perhaps, . . . conviction."³⁵ Merrill advocates a sensible interpretation of the Model Administrative Procedure Act, made explicit in the Oklahoma Act, whereby fact findings are supported by "substantial competent evidence" if the supporting evidence was admissible, and therefore "competent," by the Act's own standards, without reference to the common law.³⁶

In the context of all of the foregoing aspects of Merrill's thought and accomplishment in administrative law, it was inevitable that his casebook on the subject should be a highly personal product, reflecting his convictions and his purposes.³⁷ So it is: centered on state law considerably more than others in the field, with emphasis on Oklahoma; less inclusive than some in its reproduction and citation of material; not frugal in its textual exposition of complex points, but sparing in its exploration of many of the nuances of federal law on which others have focused. It is well organized, and highly illuminating at key points in its presentation of historical material.³⁸ Others than Merrill could use it well, although doubtless relatively few have done so because they could cull more to their own particular purposes from other collections of material. Merrill himself, naturally, added enormously to the content of these pages in the teaching of his course. The book aided materially in educating a bar, which, one feels sure, has been better equipped than most in the nation to handle knowledgeably, with awareness of the public interest, the administrative law problems of a dynamic society.

The values, attitudes, and attributes that characterize the scholar-teacher's total performance in his field are more influential in shaping the personal and professional conduct of students than the specific ideas he expresses. Some of those which reside in Merrill's work in administrative law need especially to be mentioned. The first is thoroughness and rigorous accuracy in research and exposition. Probably none of his contemporaries, unless it be Cooper,³⁹ could match his knowledge of pertinent statutes and

³⁵ *Id.* at 33-36; see also Merrill, *The Local Administrative Agencies*, 22 VAND. L. REV. 775, 796-98 (1969), where the grounds envisaged as a basis of disqualification seem somewhat narrower.

³⁶ Merrill, *Oklahoma's New Administrative Procedure Act*, *supra* note 32, at 53-54; see also Merrill, review of K.C. Davis, *Administrative Law Text*, 13 OKLA. L. REV. 364 (1960).

³⁷ M. MERRILL, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* (1954). For reviews see Woodruff, 7 OKLA. L. REV. 478 (1954), Riggs, 27 ROCKY MT. L. REV. 127 (1954), and Siegel, 8 J. LEG. ED. 116 (1955).

³⁸ Most of this history relates to modern American development. Somewhat in contrast, *Geter v. Commission for Tobacco Inspection*, 1 Bay 364, reproduced at p. 458 (1794), packs a great deal of common law philosophy about judicial review of agency action into three pages.

³⁹ See F.E. COOPER, *THE LAWYER AND ADMINISTRATIVE AGENCIES* (1951), and F.E.

decisions of all the states and his grasp of the realities they reflect.⁴⁰ The second characteristic to be noted is Merrill's belief in the written law and in judicially formulated verbal standards as a guide to administration and to further judicial decisions.⁴¹ These directives must not be stultifyingly rigid or narrow when precision is unwise or unattainable (as a life-long draftsman Merrill knows when a legal prescription should be firm and when it must allow room for the exercise of broad discretion); but it is negation of the law to allow official action to be unconfined.⁴² Flexible standards, regardless of how much they can and should be adapted to changing circumstances,⁴³ are yet essential to the law's rational process in the development of policy; for they provide, along with interpretation, a basis of reasoning, a compass to guide direction, and a check on the legitimacy of decisions—as do, for example, the grand propositions of the fifth and fourteenth amendments.⁴⁴

The third characteristic of Merrill which needs mention is adherence to his purpose of preserving the benefits of broad vision and of jurisprudential learning in the performance of essential daily tasks. However narrowly focused as to subject matter or geography, his writings make frequent references to historical antecedents, from biblical and classical to English, and to the work of the Founding Fathers. Comparative data and resort to analogies characterize all his discussions of state law problems.

When all the foregoing has been said, something yet remains. The whole person stands forth in a lifetime's teaching and products of research, making the most enduring impact of all on those who feel its influence. What, then, are the personal qualities that are present here? In-

COOPER, *STATE ADMINISTRATIVE LAW* (1965). Merrill has cited the first of these works with some frequency; the second, of course, is recent.

⁴⁰ See especially, aside from the casebook, the articles on workmen's compensation, *supra* note 18, on standards governing delegation of discretionary authority, *supra* note 23, and on the application of administrative law principles to local agencies, *supra*, note 24.

⁴¹ See Merrill's defense of formulated standards to govern delegation of discretionary authority, *supra* note 23.

⁴² On the level of constitutional law, "[t]rue liberalism, so long as it puts its trust in limited government, will be wise to insist that the limitations derive their authority from an authentic document and not from the institutional theories of the judges." Merrill, *Judicial Supremacy in a Time of Change*, 20 IOWA L. REV. 594, 605 (1935). See also Merrill, *What is the Best Form of Government for the Happiness of Man*, 15 OKLA. L. REV. 117, 125-26 (1962).

⁴³ Merrill, *Blazes for a Trail Through the Thicket of Reapportionment*, 16 OKLA. L. REV. 59, 61 (1963); Merrill, *Judicial Supremacy in a Time of Change*, *supra* note 42, at 604; Merrill, *Judicial Review of Administrative Proceedings, a Functional Perspective*, 23 NEB. L. REV. 56, 69 (1944).

⁴⁴ Merrill, *Blazes for a Trail*. . . , *supra* note 43; Merrill, *The Constitutional Opinions of Mr. Justice Roberts*, *supra* note 10.

tellectual capacity and productiveness require no further mention. Beyond them, directing their application and the transmission of their fruits to others, lie still more important qualities which everyone recognizes when confronted by them, and which affect even those who may reject specific teachings. One of these qualities in Merrill is surely loyalty—loyalty to community and state, to a region, to the nation, and to law as an institution. Some manifestations of these loyalties are evident from what has been said; others remain to be mentioned. At this point the remarkable regional loyalty of the man deserves special attention. In resorting to a figure-of-speech to characterize the influence of jurisprudence, he likened it to the feeling one gets when “one looks out over the Great Plains from some peak of the Rockies. There is the same sense of an illimitable vista, of broadened perception, of realization of the unity of the domain surveyed, of inspiration and uplift—and there is the same arduous climb before the goal is reached.”⁴⁵ The choice of metaphor was hardly accidental; it may have been subconscious or deliberate, but it reflected an attachment that went very deep, as does the love of some people for their cities. It seems a natural as well as remarkable fact, then, that seemingly all of Merrill’s writings, save a few early ones and some contributions to organizational literature, have been published west of the Appalachians.

Closely linked to loyalty is acceptance of the condition to which one has been born or to which one has been transported—not with the effect of resistance to change but for the purpose of enjoying the heritage which is part of one’s being and of directing it, as a principal resource, to chosen ends. Such is the nature of Merrill’s acceptance of the basic American legal institutions: for example, judicial determination of the constitutionality of statutes and of their application, which presents, he once wrote, “a method of dealing with the vexing problem of adjusting the claims of individual liberty with the needs of governmental authority which is familiar, indigenous, and suited to our needs. We are content therewith.”⁴⁶ Even when he was most dissatisfied with the Supreme Court’s invalidation of regulatory statutes, he confidently forecast the adaptations and overrulings that were to come.⁴⁷ Whether some of them would have come without the aid of those, less patient than Merrill, who supported political means of overcoming the Court, the oracle saith not. The chances are that they would

⁴⁵ Merrill, *Three Possible Approaches to the Study of Administrative Law*, *supra* note 5, at 231.

⁴⁶ Merrill, *Judicial Review of Administrative Proceedings, a Functional Perspective*, 23 NEB. L. REV. 56, 68 (1944).

⁴⁷ Merrill, *The New Judicial Approach to Due Process and Price Fixing*, 18 KY. L. REV. 1 (1929). Cf. Merrill, *The Constitutional Opinions of Mr. Justice Roberts*, *supra* note 10.

have, because of the role of public opinion in the total American scheme, to which Merrill has pointed.⁴⁸

An important characteristic of Merrill's has been his capacity for strong, forthright utterance, still consistent with freedom from arrogance or rancor. He could be devastating in a book review, but always in condemnation of superficiality, dishonesty, mere cleverness, or pretense, never of views that were honestly stated and offered on a basis of evidence and reason. When Merrill has taken a court decision to task, he has done so respectfully.⁴⁹ Judicial doctrine can be "transcendental nonsense"⁵⁰ in his eyes; but it is the idea, thoughtlessly repeated, not the utterer, that stands condemned. Objectivity and balance in Merrill's own views have predominated.⁵¹ They, like his respectfulness in discourse, are linked to tentativeness of conclusions, which Merrill has also cultivated. He remarked on one occasion that he thought it "axiomatic in almost any field of human research . . . that all conclusions must be tentative."⁵²

The quality of respect for persons, even in controversy with them, stems from a basic regard and concern for one's fellow men, such as Merrill has manifested in articulating the ultimate relation of law to people. It required no agonizing appraisal for him to express the conclusion that "[u]ltimately we have to say that each man must judge for himself, in the honest use of what light has been given him, where to draw the line" between obedience to law and resistance to it. When the individual has acted "according to his best light, his conscience must surely be clear in the sight of God. He may find himself in conflict with the civil authorities, but that is a risk which he must take." Because, however, human welfare is so largely dependent on order and on social decisions reached through law, "in most things, we set ourselves against the common good if we deliberately put ourselves in opposition to the commands of the social order."⁵³ The disposition to obey the law, including in this country the constitutional deci-

⁴⁸ Merrill, *What is the Best Form of Government for the Happiness of Man*, *supra* note 42, at 125-26.

⁴⁹ It was indicative of the nature of the man that his first article in what was then his home state was critical of a decision of the state's highest court. Merrill, *Some Observations Concerning Gordon v. Lowry*, 6 NEB. L. BULL. 410 (1928).

⁵⁰ Merrill, *Oklahoma's New Administrative Procedure Act*, *supra* note 29, at 40.

⁵¹ Despite his belief in judicial supremacy, he has been quick to point out to the contemnors of bureaucracy, in book reviews and elsewhere, that the courts too have perpetuated abuses. See, e.g., Merrill, *Cases and Materials on Administrative Law*, 235-36 (1954); review of F.E. Cooper, *The Lawyer and Administrative Agencies*, 42 MINN. L. REV. 682 (1958).

⁵² *Round Table on Law School Objectives and Methods*, 9 AMER. L. SCH. REV. 566 (1940).

⁵³ Review of T.E. Davitt, *The Nature of Law*, 5 OKLA. L. REV. 515 (1952).

sions of the Supreme Court, "is the keystone of our whole arch of orderly government."⁵⁴

Merrill's concern for humankind extends to those throughout the world whose welfare imposes "[t]he imperative task of our time, . . . to establish a legal order among nations. . . ."⁵⁵ Administrative agencies will have their place in such an order, but it is not the professional bias of an administrative or any other variety of lawyer which motivates this conclusion. The call stems, rather, from the intense desire of a total person to "advance the happiness of mankind."⁵⁶ In that intense desire lies, at bottom, the foundation not only of this paramount proposal, but of all the undertakings of Maurice H. Merrill, responsible member of the human race and scholar-teacher in administrative law.

⁵⁴ Merrill, *What is the Best Form of Government for the Happiness of Man*, *supra* note 42, at 126.

⁵⁵ *Id.* at 128.

⁵⁶ *Id.* at 129.